

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

GIOVANNI VALERIO,

v.

Petitioner,

Case No. 2:10-cv-01806-GMN-EJY

ORDER

ANTHONY SCILLIA, *et al.*,

Respondents.

This represented habeas matter under 28 U.S.C. § 2254 comes before the Court on a continuing post-remand inquiry regarding the timeliness of the petition and further following upon recent memoranda filed by the parties. (ECF Nos. 91 & 92.)

Background

Petitioner Giovanni Valerio challenges his Nevada state conviction, pursuant to a guilty plea, of six counts of robbery with the use of a deadly weapon. With the weapon sentencing enhancements, he is serving twelve consecutive terms of 26 to 120 months, amounting in the aggregate to a combined sentence of 26 to 120 years. (ECF No. 11-3, at 26-27.)

The time period for appealing the July 11, 2002, judgment of conviction expired on Monday, August 12, 2002, without Valerio having taken a direct appeal.¹

¹ As the Court noted in its September 22, 2017, order (ECF No. 66), prior orders instead had used either August 10, 2002, or August 11, 2002. Those dates fell in the weekend; and the 30-day time period to appeal did not actually expire until the following judicial day on the Monday. It does not appear that the motion for reconsideration of sentence filed on July 22, 2002, (ECF No. 11-3, at 29-33) constituted a tolling motion under Nevada Rule of Appellate Procedure 4(a)(4). Cf. *Phelps v. State*, 111 Nev. 1021, 1022, 900 P.2d 344, 345 (1995) (motion for reconsideration not a tolling motion). The motion in any event was denied on August 2, 2002, and the motion thus would have extended the appeal time to only Tuesday, September

1 After 318 days had elapsed, Valerio filed a timely state postconviction petition on
 2 June 27, 2003, alleging, inter alia, that he had been denied his right to appeal through
 3 ineffective assistance of counsel. The Supreme Court of Nevada agreed and allowed
 4 Valerio to pursue a *Lozada* petition² to present direct-appeal claims. Proceedings were
 5 pending on the initial state petition and/or the *Lozada* petition authorized thereby
 6 substantially continuously from June 27, 2003, through to the issuance of a remittitur in
 7 the state supreme court following the disposition of the *Lozada* petition on June 17, 2008.
 8 (ECF Nos. 11-4 through 11-7. See also ECF No. 14, at 4 n.3.)³

9 After another 337 days had elapsed, on May 21, 2009, petitioner filed another state
 10 postconviction petition. The Supreme Court of Nevada ultimately determined that the
 11 petition was timely, but the court denied relief on September 29, 2010, variously on the
 12 merits and under the doctrine of law of the case. The remittitur issued on October 27,
 13 2010. (ECF Nos. 11-7 & 11-8.)

14 The federal petition was constructively filed on or about October 11, 2010, and was
 15 actually filed on October 15, 2010, with both dates being prior to the issuance of the
 16 remittitur in the last state court proceeding.

17 The Court dismissed the petition as untimely in 2011. (ECF Nos. 14 & 15.) The
 18 Ninth Circuit reversed and remanded nearly seven years ago in August 2013. (ECF Nos.
 19 24-25.) The Court of Appeals remanded “for an evidentiary hearing or for other further
 20 factual development as may be necessary to determine whether Valerio has exercised

21 3, 2002, after the Labor Day holiday, if it instead properly was viewed to be a tolling motion. (ECF No. 11-
 22 3, at 43-44.)

23 ² As discussed further *infra*, at that time under Nevada practice, a petition pursuant to *Lozada v. State*, 110 Nev. 349, 871 P.2d 944, 950 (1994), rejected on other grounds, *Rippo v. State*, 134 Nev. 411, 426 n.11, 423 P.3d 1084, 100 n.11 (2018), allowed a petitioner to pursue all issues that he otherwise could have pursued in a timely direct appeal instead via a state postconviction petition.

24 ³ As also discussed in the September 22, 2017, order, the Court previously has counted the elapsed
 25 days for this period instead at 321 in earlier orders. This variance is due in part to the different date of
 26 expiration applied for the direct appeal time. Moreover, neither the August 12, 2002, day on which the
 27 appeal time expired nor the first day of the June 27, 2003, statutory tolling event count against the federal
 28 limitation period. Neither the earlier orders nor the order of remand from the Ninth Circuit preclude the
 Court from correctly calculating the running of the federal limitation period in determining whether equitable
 tolling renders the federal petition timely. (See ECF No. 66, at 2 n.4; *id.*, at 11 & n.19.)

1 reasonable diligence.” (ECF No. 24, at 3.) Since the remand, the parties have briefed
 2 multiple issues; the Court has allowed discovery; and the action further has been stayed
 3 temporarily to await a potentially key decision by the Ninth Circuit *en banc* in *Smith v.*
 4 *Davis*, 953 F.3d 582 (9th Cir. 2020) (*en banc*).

5 ***Discussion***

6 ***The Date After Which the Federal Limitation Period Starts to Run***

7 In his memorandum, Valerio, *inter alia*, challenges the Court’s multiple prior
 8 holdings that the federal limitation period began running from the expiration of the time to
 9 file a timely direct appeal, *i.e.*, after August 12, 2012. He urges in his current briefing that
 10 the Ninth Circuit decision relied on previously by the Court, *Randle v. Crawford*, 604 F.3d
 11 1047 (9th Cir. 2010), effectively has been overruled on an underlying point of Nevada
 12 state law by intervening state supreme court authority.

13 In the context relevant here, under 28 U.S.C. § 2244(d)(1)(A), a one-year
 14 “limitation period shall run from . . . the date on which the judgment became final by the
 15 conclusion of direct review or the expiration of the time for seeking such review.”⁴

16 In *Lozada*, *supra*, the Ninth Circuit previously had ruled that Lozada had been
 17 denied his right to appeal by ineffective assistance of counsel; this Court thus
 18 conditionally granted the writ subject to the State allowing Lozada to take a delayed
 19 appeal within a reasonable time; and Lozada thereafter filed a notice of appeal in the
 20 state district court. 110 Nev. at 351-52, 871 P.2d at 945-46.

21 Significantly for the present issue, on the ensuing state court appeal, the Supreme
 22 Court of Nevada found that the Ninth Circuit had “fail[ed] to recognize” governing Nevada
 23 state law regarding the availability of a direct appeal:

24 This court lacks jurisdiction to entertain Lozada’s
 25 appeal. Lozada filed a notice of appeal from his 1987
 26 judgment of conviction well after the thirty-day appeal period
 prescribed by NRAP 4(b). We have consistently held that an
 untimely notice of appeal fails to vest jurisdiction in this court.

27 ⁴ Section 2244(d)(1) provides that the one-year limitation period “shall run from the latest of” four
 28 possible triggering dates. The other three possible trigger dates in subparagraphs (B) through (D) are not
 pertinent to the specific issue raised by Valerio in his recent memorandum that is discussed in the text.

1 See, e.g., *Jordon v. Director, Dep't of Prisons*, 101 Nev. 146,
 2 696 P.2d 998 (1985). We must, therefore, dismiss Lozada's
 3 appeal for lack of jurisdiction.

4 In light of the Ninth Circuit's failure to recognize the
 5 jurisdictional limitations on our authority to grant Lozada an
 6 appeal, we deem it necessary to detail Lozada's possible
 7 remedies. Our decision does not leave Lozada without a
 8 complete and adequate remedy. Lozada may obtain relief in
 9 the district court by filing a petition for a writ of habeas corpus.

10 *Id.*, at 352, 871 P.2d at 946.

11 The state supreme court further established that the relief available to the petitioner
 12 on such a petition – which was made available to remedy the unconstitutional deprivation
 13 of a right to a direct appeal – would be substantially the same as the relief that would
 14 have been available on a direct appeal. The petitioner therefore could raise in such a
 15 petition “any issues which he could have raised on direct appeal.” *Id.*, at 359, 871 P.2d
 16 at 950. Further, the petitioner would be entitled to counsel, appointed if necessary. The
 17 court stated that “[b]ecause convicted persons have the right to counsel on direct appeal,
 18 the appointment of counsel is essential to remedy the loss of the right to appeal.” *Id.*
 19 Concluding that the procedure afforded thus “provides . . . a complete remedy for the
 20 alleged denial of [the] right to appeal,” the state supreme court therefore dismissed the
 21 then pending appeal for lack of jurisdiction without prejudice to the right to file instead a
 22 postconviction petition in the state district court. *Id.*⁵

23 Thereafter, the United States Supreme Court held in *Jimenez v. Quarterman*, 555
 24 U.S. 113 (2009), that the grant of an out-of-time direct appeal resets the start of the federal
 25 limitation period under § 2244(d)(1)(A), with the limitation period then starting to run fully
 26 anew in relation to that new appeal opportunity rather than the expired original appeal
 27 opportunity.

28 ⁵ Subsequently, Rule 4(c) of the Nevada Rules of Appellate Procedure (NRAP) was amended to
 29 allow for the filing of an untimely appeal where a state or federal court has found that the convicted individual
 30 had been unconstitutionally deprived of a right to a direct appeal. This subsequent change in NRAP 4(c)
 31 has no bearing on the present case. All pertinent events in this case occurred prior to the change in the
 32 law, and the *Lozada* petition remedy discussed in the text was the only available remedy under Nevada law
 33 at the pertinent times. Any issues regarding the proper application of § 2244(d)(1)(A) to untimely appeals
 34 under NRAP 4(c) are not presented in this case.

1 In *Randle*, *supra*, the petitioner argued that the *Jimenez* holding should be
 2 extended to a Nevada *Lozada* petition because a decision on a *Lozada* petition “is
 3 equivalent to a decision on an out-of-time direct appeal.” 604 F.3d at 1056.

4 The Ninth Circuit rejected this argument, based upon the holding in *Lozada* that
 5 an out-of-time direct appeal then was unavailable under Nevada state law:

6 [W]e disagree with Randle's argument on the merits
 7 because *Jimenez* is distinguishable. In that case, the
 8 petitioner missed his opportunity to file a direct appeal from
 9 his conviction and sentence in state court. [555 U.S. at 115-
 10 16.] He then filed a state habeas petition, arguing that he was
 11 denied his right to appeal. [*Id.*, at 116.] The state court of
 12 appeal agreed, and [the court] granted the petitioner *the right*
 13 *to file an out-of-time appeal*, which the petitioner promptly
 14 pursued. *Id.* The petitioner's conviction was ultimately
 15 affirmed. [*Id.*] After the time in which to petition the Supreme
 Court for *certiorari* had expired, the petitioner filed a federal
 habeas petition. [*Id.*, at 117.] The district court dismissed the
 petition as untimely, rejecting the petitioner's argument that
 the “conclusion of direct review” in his case occurred when the
 time expired for seeking *certiorari* review of the decision in his
 out-of-time appeal. [*Id.*, at 117-18.] The Fifth Circuit denied a
 certificate of appealability on the timeliness issue. [*Id.*, at 118.]

16 The Supreme Court reversed the judgment of the Fifth
 17 Circuit, reasoning that “direct review cannot conclude for
 18 purposes of § 2244(d)(1)(A) until the availability of direct
 19 appeal to the state courts, and to this Court, has been
 20 exhausted.” [*Id.* at 119] (internal citations and quotation marks
 21 omitted). In *Jimenez*, “the order granting an out-of-time appeal
 22 restored the pendency of the direct appeal and petitioner's
 23 conviction was again capable of modification through direct
 24 appeal to the state courts and to this Court on *certiorari*
 25 review.” [*Id.* at 120.] (internal citation and quotation marks
 26 omitted). Thus, the Court held, “the date on which the
 27 judgment became final by the conclusion of direct review or
 28 the expiration of the time for seeking such review must reflect
 the conclusion of the out-of-time direct appeal, or the
 expiration of the time for seeking review of that appeal.” [*Id.* at
 121.] *The Court emphasized that this holding is a “narrow one”*
based on the “most natural reading of the statutory text.” [*Id.*
 at 119, 121.]

1 In the case before us, Randle argues that the Nevada
 2 Supreme Court's decision on his first state habeas petition *is*
 3 *equivalent to a decision on an out-of-time direct appeal. But*

1 unlike *Jimenez*, the Nevada Supreme Court never granted
 2 *Randle* leave to file an out-of-time direct appeal. Rather, the
 3 state supreme court explicitly stated that an untimely direct
 4 appeal was foreclosed by state rules, and that “[a]n untimely
 5 notice of appeal fails to vest jurisdiction in this court.” At no
 6 point did the Nevada Supreme Court “restor[e] the pendency
 7 of the direct appeal,” nor was “petitioner’s conviction … again
 8 capable of modification through direct appeal to the state
 9 courts and to [the Supreme Court] on certiorari review.”
 10 *Jimenez*, [555 U.S. at 120] (internal citation omitted). *Randle*
 11 sought to restore his direct appeal, and that request was
 12 rejected by the Nevada Supreme Court. Although *Randle* was
 13 entitled to present, pursuant to *Lozada*, the arguments that he
 14 would have presented on direct appeal in his state
 15 postconviction relief proceeding, his direct appeal was not,
 16 and could not be, reinstated. *Jimenez* therefore does not
 17 apply, and we conclude that the one-year limitations period
 18 did not begin on December 2, 2002, [following the conclusion
 19 of the *Lozada* petition proceedings].

20 604 F.3d at 1056-57 (emphasis added).

21 In the present case, prior to the federal appeal, the Court held in part pertinent to
 22 this issue that Valerio’s judgment of conviction became final and the federal limitation
 23 therefore began running from the date on which the time to file a state court direct appeal
 24 expired in August 2002. (ECF No. 14, at 4.)⁶

25 On appeal to the Ninth Circuit, Valerio, through counsel, argued, *inter alia*, that the
 26 Court erred in holding that the federal limitation period started running in August 2002
 27 because his conviction instead was not final until after the expiration of the time to seek
 28 certiorari review from the *Lozada* proceeding. Valerio urged, *inter alia*, that *Randle* should
 29 not be followed because it was “in clear tension” with a later panel decision in *Thompson*
 30 *v. Lea*, 681 F.3d 1093 (9th Cir. 2012). (See Ninth Circuit No. 11-16384, ECF No. 14, at
 31 18-28; *id.*, ECF No. 24, at 6-21.) *Thompson* held that the California state supreme court’s
 32 initial grant of review of a petition to review a lower appellate court’s order denying a
 33 motion to reinstate a direct appeal reset the start of the federal limitation period under §
 34 2244(d)(1)(A) and *Jimenez*. 681 F.3d at 1094.

25 ⁶ Valerio was pro se in this Court at the time. The Ninth Circuit granted his motion for counsel
 26 during the appeal. *Randle* had been decided by the time of this Court’s initial ruling on this issue in 2011.

1 The Ninth Circuit reversed and remanded on other grounds. The Court of Appeals
2 expressly stated that “[w]e need not, and do not, reach the merits of any other issue urged
3 on appeal, including Valerio’s claim that his conviction was not final until after the
4 adjudication of his *Lozada* petition.” (ECF No. 24, at 3.)⁷

On remand, Valerio, *inter alia*, pursued his argument that the proceedings on his *Lozada* petition reset the start date of the federal limitation period under § 2244(d)(1)(A) and that the prior published panel decision in *Randle* should not be followed because of the later published panel decision in *Thompson*. This Court rejected Valerio’s argument, concluding that it was bound by the directly apposite and binding authority in *Randle*. (ECF No. 38, at 4-6.) In a subsequent order, the Court affirmed that it had “no occasion to reconsider its alternative holding that the limitation period began to run instead after the expiration of the time to appeal the original judgment,” as per Ninth Circuit authorities cited previously, which included *Randle*. (ECF No. 66, at 11-12 n.19.)

In his most recent filing, Valerio urges that two unpublished state supreme court decisions “indicate” that the Ninth Circuit did not properly interpret *Lozada* in *Randle*. Valerio suggests that the decisions disapprove of *Randle* because the decisions establish that the *Lozada* remedy – quoting Valerio – “has the same effect as a re-opened appeal,” has “the same purpose and effect as a direct appeal,” and is “the same as a direct appeal.” He relies on a 2011 decision holding that a later claim of ineffective assistance of *Lozada* counsel should have been addressed as a claim of ineffective assistance of appellate counsel. He relies also on a 2012 decision holding that the state limitations period began to run after the remittitur date from the *Lozada* procedure because it took the place of the direct appeal. (ECF No. 91, at 5-7, and unpublished decisions cited therein.)⁸

⁷ Thus, neither the law of the case doctrine nor the mandate rule preclude this Court from reaching this issue. (See also ECF No. 66, at 11-12.) Moreover, a federal district court has plenary authority to reconsider prior interlocutory rulings in the case without regard to the restrictions of Rules 59 and 60 of the Federal Rules of Civil Procedure, which apply only to post-judgment challenges. See, e.g., *City of Los Angeles, Harbor Division v. Santa Monica Baykeeper*, 254 F.3d 882, 885 (9th Cir. 2001).

⁸ Of two additional “see also” citations referenced by Valerio, a 2014 case adds little of additional direct import; and a 2009 decision was decided before *Randle* and thus could not disapprove of *Randle*. Valerio repeatedly refers to this argument as a “statutory tolling” argument. The issue clearly is not one of

1 The two unpublished decisions do not at all undercut *Randle*.

2 The holding in *Randle* does not turn upon whether a *Lozada* petition is functionally
 3 “the same as” a direct appeal. The *Randle* panel did not contest the petitioner’s argument
 4 there that a decision on a *Lozada* petition was “the equivalent to a decision on an out-of-
 5 time direct appeal.” 604 F.3d at 1056. The *Randle* panel indeed explicitly acknowledged
 6 that the petitioner “was entitled to present, pursuant to *Lozada*, the arguments that he
 7 would have presented on direct appeal.” 604 F.3d at 1057. The *Randle* panel decision
 8 therefore was not based upon some difference that rendered the *Lozada* remedy not
 9 functionally similar to the direct-appeal remedy, *i.e.*, some feature that would make the
 10 *Lozada* remedy functionally “not the same as” a direct appeal.

11 Rather, *Randle* relied expressly and exclusively on the established rule stated in
 12 *Lozada* that an untimely state appeal then was foreclosed by state rules and that an
 13 untimely appeal failed to vest jurisdiction in the state appellate courts. 604 F.3d at 1056-
 14 57. The pertinent point for the panel was that “the Nevada Supreme Court never granted
 15 *Randle* leave to file an out-of-time direct appeal” because it could not do so. 604 F.3d at
 16 1056. This state law rule, the one actually relied upon in *Randle*, has not at all been
 17 disapproved of by subsequent decisions of the Supreme Court of Nevada. Indeed, to this
 18 day, the Supreme Court of Nevada continues to cite *Lozada* for the still viable rule that
 19 an untimely direct appeal fails to vest jurisdiction in that court, subject only to a
 20 subsequent rule amendment that had no application to this case. See, *e.g.*, *Sparrow v.*
 21 *State*, No. 81301, 2020 WL 3888749 (Nev. July 9, 2020) (unpublished).⁹

22 statutory tolling of a *running* limitation period but instead is one of when the limitation period *starts* to run,
 23 or in this instance restarts fully anew. That is, the issue is not one of stopping a running limitation period
 24 by statutory tolling under § 2244(d)(2) but instead is one of when the limitation period starts (or restarts fully
 25 anew) under § 2244(d)(1)(A). The four alternatives in § 2244(d)(1), including subparagraph (A), all function
 26 essentially as accrual rules vis-à-vis the federal limitation period, *i.e.*, they determine when the federal
 limitation period *begins* to run as against an otherwise ripe claim. None of those four alternatives set forth
 a statutory-tolling rule, which instead would concern the stopping, *i.e.*, the suspension, of an *already running*
 limitation period. While the Court previously also has used the incorrect statutory-tolling phraseology in
 prior orders, it clarified the distinction in the September 22, 2017, order. (ECF No. 66, at 11 n.19.)

27 ⁹ In his prior briefing in the Ninth Circuit, Valerio focused additionally on the fact that *certiorari* review
 28 can be sought from a final state appellate decision denying relief on a *Lozada* petition. Valerio invoked a
 passage in *Jimenez* that states that, after the state court granted an *out-of-time direct appeal*, the

1 The unpublished decisions relied upon by Valerio thus neither explicitly disapprove
 2 of nor even implicitly undercut any Nevada state law premise relied upon by the panel in
 3 *Randle*.

4 Moreover, the 2011 and 2012 unpublished decisions relied upon by Valerio do not
 5 constitute binding precedent in the state appellate courts and cannot even be properly
 6 cited in those courts. Under NRAP 36(c)(2) and (3), an unpublished disposition does not
 7 constitute mandatory authority in other cases; and a party may cite an unpublished state
 8 supreme court disposition “for its persuasive value, if any” only if it was issued on or after
 9 January 1, 2016.

10 Moreover, neither decision even cites *Randle*. In contrast, in the decision upon
 11 which Valerio cites to exemplify the power of a state supreme court to effectively overrule
 12 a federal circuit court on a point of state law, the Supreme Court of Nevada explicitly cited
 13 the prior Ninth Circuit case of which it disapproved and criticized that federal decision in
 14 extensive reasons. See *Babb v. Lozowski*, 719 F.3d 1019, 1027-30 (9th Cir. 2013),
 15 *overruling on other grounds recognized in, Moore v. Helling*, 763 F.3d 1011 (9th Cir. 2104).
 16 *Randle*, however, *never* has been even cited in the Nevada state appellate courts, in a
 17 single published or even unpublished decision.

18 Valerio’s argument thus would have this Court conclude that the Supreme Court
 19 of Nevada effectively overruled a Ninth Circuit panel decision on a point of Nevada law in
 20

21 “petitioner’s conviction was again capable of modification through direct appeal to the state courts and to
 22 this Court on certiorari review.” 555 U.S. at 120. Valerio argued that, after an adverse decision by the state
 23 supreme court on a *Lozada* petition “[t]he Nevada Supreme Court’s decision was then capable of
 24 modification through a writ of certiorari to the Supreme Court.” (Ninth Circuit No. 11-16384, ECF No. 14,
 25 at 21.) However, the potential availability of *certiorari* review is a distinction without a difference. *Certiorari*
 26 review can be sought from any final decision of the state’s highest level of appellate review that presents a
 27 federal question, including, *inter alia*, a final appellate decision denying relief on a standard, non-*Lozada*,
 28 state postconviction petition. The potential availability of *certiorari* review does not make a *Lozada* petition
 a “direct appeal” any more so than it makes a standard state postconviction petition a direct appeal. The
 salient point, for the *Randle* panel, was that, because of the absence of jurisdiction over an untimely direct
 appeal under state law, the conviction was not “again capable of modification *through direct appeal* to the
 state courts and to [the Supreme Court] on certiorari review.” *Randle*, 604 F.3d at 1057 (quoting *Jimenez*,
 with bracketed material added in *Randle* and italic emphasis added herein). The point being made did not
 concern the availability of *certiorari* review but instead was that a *direct appeal* was not available under
 state law. The mere fact that *certiorari* review potentially was available did not make a *Lozada* petition – or
 any other state court procedure – a direct appeal.

1 state court decisions that: (a) did not even mention the purportedly overruled panel
2 decision in the first instance, (b) were unpublished and thus explicitly had no binding
3 precedential value under express Nevada appellate rules governing citation of
4 unpublished decisions, and (c) most significantly, *did not overturn* the relevant point of
5 state law relied upon by the panel, which state law rule *continues* to be adhered to in state
6 supreme court decisions. That is a singularly unpersuasive argument.

The Court therefore holds for the third – and final, absent new intervening authority directly on point – time that the federal limitation period started running in this case after the expiration of the time to file a timely direct appeal, *i.e.*, after August 12, 2002.¹⁰

¹⁰ Valerio additionally urges that this Court “implicitly recognized the exact nature of the *Lozada* proceedings” when it found that his May 21, 2009, timely state petition would statutorily toll any then-still-running federal limitation period. (ECF No. 91, at 7.) This subsidiary argument is even less persuasive. The state supreme court ultimately found that that state petition was timely. Such a determination by a state high court is “the end of the matter” regarding whether the petition gives rise to statutory tolling under § 2244(d)(2). *E.g., Pace v. DiGuglielmo*, 544 U.S. 408, 413-14 (2005). This Court’s acceptance of the state supreme court’s finding that the May 21, 2009, petition was timely under state law connotes no determination by this Court other than a recognition that the state court’s determination is conclusive on that specific point under controlling Supreme Court precedent. No other inference can be drawn from that recognition. This simply is another fundamentally flawed argument.

16 Valerio further suggests that *Smith* “calls for this Court to reconsider how *Randle* applies in light of
17 *Smith*.” (ECF No. 91, at 5.) Nothing in *Smith*, which concerned equitable tolling independent of the federal
18 limitation statute, leads to a reexamination of *Randle*, which concerned instead the time from which the
19 limitation period begins to run under § 2244(d)(1)(A). As discussed further *infra*, the *en banc* decision in
20 *Smith* rejecting the application of a “stop-clock” approach to equitable tolling adopted in later Ninth Circuit
cases in large measure simply returns the law to principles that already had been long present in Supreme
Court and the Ninth Circuit decisions. The Ninth Circuit and this Court had been applying these principles
for years prior to the later application of a stop-clock approach specifically to cases arising under AEDPA.
In other words, *Smith* does not lead to a massive reset where every prior decision applying any provision
of § 2244(d) inherently necessarily must be reexamined. *Smith* does not call *Randle* into question.

The Court definitively rejects Valerio's arguments regarding the *Lozada* petition now so that the parameters for the proper analysis of the time-bar issue are clearly established for further proceedings on the issue in the district court. The directly apposite *Randle* continues to be the controlling authority in the district court. However, the district court rulings herein of course do not preclude Valerio from possibly later seeking to challenge *Randle* directly in the Ninth Circuit on a petition for initial and/or rehearing *en banc* review, based on the alleged conflict with *Thompson*. The underlying issue of when the federal limitation period begins to run would appear to be outcome determinative on the limitation defense. If the *Lozada* proceedings did reset the running of the federal limitation period under § 2244(d)(1)(A), then the limitation period would not begin to run until after August 18, 2008, the date on which the time period to seek *certiorari* review of the May 20, 2008, order of affirmance on the *Lozada* petition expired. The timely May 21, 2009, state petition thereafter would statutorily toll the federal limitation period past the constructive filing date of the federal petition. Less than 365 days elapsed between August 18, 2008, and May 21, 2009.

For the proceedings in the district court, however, the Court – once again, and for the final time based on current caselaw – reaffirms that the issue is controlled by the Ninth Circuit's directly apposite *Randle* decision.

1 ***The Impact of Smith on a Possible Evidentiary Hearing***

2 In *Smith*, the *en banc* court rejected the application of a “stop-clock” approach to
 3 equitable tolling that a panel had applied to federal habeas cases arising under AEDPA¹¹
 4 in *Gibbs v. Legrand*, 767 F.3d 879 (9th Cir. 2014). 953 F.3d at 586 & 599 (“we today reject
 5 the stop-clock approach”). Under that firmly-rejected approach, an extraordinary
 6 circumstance would stop, or suspend, the running of the federal limitation period for the
 7 duration of the extraordinary circumstance, substantially as statutory tolling operates.
 8 See generally 953 F.3d at 586 & 589. *Smith* ended the approximately six-year run of the
 9 application of the stop-clock approach to AEDPA cases in the Ninth Circuit.

10 Smith instead returned the law in this area to prior, long-established principles in
 11 Supreme Court and Ninth Circuit caselaw, established principles that had been applied
 12 in countless AEDPA cases in this Court prior to *Gibbs*. See 953 F.3d at 592-95; see, e.g.,
 13 *Lindolfo Thibes v. Robert LeGrand*, No. 3:11-cv-00339-MMD-WGC, ECF No. 33, at 5-8
 14 (D. Nev. July 26, 2013). Under that caselaw, an extraordinary circumstance did not
 15 automatically stop the limitation period from running for a specific interval. The petitioner
 16 instead had to demonstrate, *inter alia*, a causal connection between the extraordinary
 17 circumstance and their failure to file a timely federal petition. See generally 953 F.3d at
 18 589 & 595. Thus, for example, all else being equal, an extraordinary circumstance lasting
 19 for 30 days might have a markedly different impact on the equitable tolling analysis from
 20 a causation perspective if it occurred at the very end of the one-year limitation period as
 21 opposed to at the very beginning. Under the rejected stop-clock approach, that 30 days
 22 instead would have been categorically excluded from the calculation of the limitation
 23 period and further would have been excluded without regard to whether the extraordinary
 24 circumstance ultimately had a causal relationship to the untimely filing.

25 *Smith* restated what had been, prior to *Gibbs*, well-established law applied in
 26 AEDPA cases in this Court. The *en banc* court noted the following statement of the
 27 governing standard for equitable tolling in *Holland v. Florida*, 560 U.S. 631 (2010):

28 ¹¹ The Antiterrorism and Effective Death Penalty Act of 1996.

1 A petitioner seeking equitable tolling bears the burden
 2 of establishing two elements: "(1) that he has been pursuing
 3 his rights diligently, and (2) that some extraordinary
 4 circumstance stood in his way' and prevented timely filing."

5 Smith, 953 F.3d at 588, quoting Holland, 560 U.S. at 649 (quoting prior authority); see
 6 also Smith, 953 F.3d at 595.

7 The *en banc* court expounded on how these elements are to be applied in AEDPA
 8 cases in the following two related holdings:

9 D. *The Proper Rule of Equitable Tolling of Statutes of*
 10 *Limitations*

11 In view of the historic practice of courts of equity and
 12 modern Supreme Court precedent governing equitable tolling,
 13 we make two related holdings. First, for a litigant to
 14 demonstrate "he has been pursuing his rights diligently,"
 15 *Holland*, 560 U.S. at 649 . . . , and thus satisfies the first
 16 element required for equitable tolling, he must show that he
 17 has been reasonably diligent in pursuing his rights not only
 18 while an impediment to filing caused by an extraordinary
 19 circumstance existed, *but before and after as well, up to the*
time of filing his claim in federal court. This rule is in accord
 20 with the traditional concept that equity requires diligence and
 21 is also consistent with recent Supreme Court practice. . . .
 22 On [the reasonable-diligence] issue the rule remains that
 23 "[t]he diligence required for equitable tolling purposes is
 24 'reasonable diligence,' not 'maximum feasible diligence.'"
 25 *Holland*, 560 U.S. at 653 . . . (citations omitted). In determining
 26 whether reasonable diligence was exercised courts shall
 27 "consider the petitioner's overall level of care and caution in
 28 light of his or her particular circumstances," *Doe v. Busby*, 661
 F.3d 1001, 1013 (9th Cir. 2011), and be "guided by 'decisions
 made in other similar cases ... with awareness of the fact that
 specific circumstances, often hard to predict in advance, could
 warrant special treatment in an appropriate case.'" *Fue [v.
 Biter]*, 842 F.3d [650,] 654 [(9th Cir. 2016) (*en banc*)] (quoting
Holland, 560 U.S. at 650, . . .). What we make clear is that it
 is not enough for a petitioner seeking an exercise of equitable
 tolling to attempt diligently to remedy his extraordinary
 circumstances; *when free from the extraordinary
 circumstance*, he must *also* be diligent in actively pursuing his
 rights.

29 Second, and relatedly, it is only when an extraordinary
 30 circumstance prevented a petitioner acting with reasonable
 31 diligence from making a timely filing that equitable tolling may

be the proper remedy. This rule aligns with the flexible and fact-specific nature of equity and is directed by Supreme Court precedent. To be clear, this rule does not impose a rigid “impossibility” standard on litigants, and especially not on “pro se prisoner litigants—who have already faced an unusual obstacle beyond their control during the AEDPA limitation period.” *Fue*, 842 F.3d at 657 (quoting *Sossa v. Diaz*, 729 F.3d 1225, 1236 (9th Cir. 2013)). In evaluating whether an “extraordinary circumstance stood in [a petitioner’s] way and prevented timely filing,” a court is not bound by “mechanical rules” and must decide the issue based on all the circumstances of the case before it. *Holland*, 560 U.S. at 649–50, . . . (internal quotation marks omitted).

953 F.3d at 598-600 (emphasis added).

In his recent memorandum, petitioner asserts that “under *Smith*, there seems to be an open question about whether Valerio now has to show reasonable diligence for that (untolled) time that elapsed between his *Lozada* [petition, which he calls instead a direct appeal] ending on June 17, 2008, through [the] filing [of] his state post-conviction petition on May 21, 2009.” (ECF No. 91, at 4.) That is, he suggests that there is an open question under *Smith* as to whether he must show that he exercised reasonable diligence during the second, 337-day period outlined in the background, *supra*, at 2. Valerio further maintains that he heretofore “has never had to make that argument [that he exercised reasonable diligence during the 337-day period], and counsel would need time to investigate before presenting it.” (ECF No. 91, at 7.) Valerio represents that if the Court (a) rejects his argument as to effect of the *Lozada* petition (which it has, *supra*), and (b) determines that *Smith* requires that he show reasonable diligence during the 337-day period, “then he must be given the opportunity to develop those facts and the parties should be permitted to brief the issue.” (*Id.*, at 8.) He posits that “[u]pon the completion of the briefing this Court will be positioned to decide if the hearing should be expanded to include the elapse of time after the *Lozada* proceedings ended and before Valerio filed his state post-conviction petition.” (*Id.*)

The Court is not persuaded that there is any “open question” as to whether *Smith* requires Valerio to demonstrate reasonable diligence as to all untolled periods, including

1 the 337-day period. *Smith* quite clearly states, consistent with established law prior to
 2 *Gibbs*, that a petitioner “must show that he has been reasonably diligent in pursuing his
 3 rights not only while an impediment to filing caused by an extraordinary circumstance
 4 existed, *but before and after as well, up to the time of filing his claim in federal court.*” 953
 5 F.3d at 599 (emphasis added); see also *id.*, at 589 (“before and after the extraordinary
 6 circumstances were dispelled” and “before, during and after the extraordinary
 7 circumstance existed”); *id.*, at 593 (“the Supreme Court emphasized Pace’s lack of
 8 diligence in all time frames, right up to Pace filing his federal petition”).

9 Valerio nonetheless attempts to limit *Smith* by suggesting that the *en banc* case is
 10 a “traditional case” that “doesn’t include the kind of alternating periods of equitable and
 11 statutory tolling that are present here.” Valerio urges that *Smith* apparently only
 12 “contemplate[s] the more traditional case in which equitable tolling coming [sic] after
 13 statutory [tolling] ends, leading up to the filing of a federal petition.” (ECF No. 91, at 4.)

14 The Court is not persuaded. Nothing in the discussion in *Smith*, or in the prior
 15 established law that it canvasses, suggests that the principles that it discusses are limited
 16 to what Valerio describes as “traditional” cases. That law has been applied, including by
 17 this Court, in myriad different factual and procedural contexts over the years prior to the
 18 application instead of a stop-clock approach to AEDPA cases in *Gibbs*. Nothing limits the
 19 application of those established principles from equity to a category of cases that Valerio
 20 would cordon off as somehow “traditional” cases.

21 In this case, 318 days elapsed between the expiration of the time to file a direct
 22 appeal on August 12, 2002, and the June 27, 2003, filing of the first timely state
 23 postconviction petition that led to the *Lozada* proceedings. Absent any further statutory
 24 tolling or delayed accrual, the federal limitation therefore putatively expired after only
 25 another 47 days had elapsed after the June 17, 2008, conclusion of the *Lozada*
 26 proceedings, i.e., on Monday, August 4, 2008. The fact that Valerio later filed a second
 27 timely state postconviction petition on May 21, 2009, will make no difference if his federal
 28 petition already was time-barred before he filed the second state petition. See, e.g., *Rudin*

1 *v. Myles*, 781 F.3d 1043, 1056 n.16 (9th Cir. 2015) (a statute of limitations that already
2 has run cannot be tolled thereafter).

3 Valerio's concern about "alternating periods of equitable and statutory tolling" thus
4 misses the mark. Under settled legal principles, the federal limitation period in this case
5 putatively expired on August 4, 2008, only a day more than 47 days into the second 337-
6 day period. Valerio does not even reach a last "alternating period" of statutory tolling if
7 he does not overcome the expiration of the limitation period on August 4, 2008. To do
8 that, he must show that, despite the exercise of reasonable diligence, an extraordinary
9 circumstance prevented him from filing a federal petition before the federal limitation
10 period expired. *E.g., Smith*, 953 F.3d at 595. He thus must show under previously
11 established principles that are once again reaffirmed in *Smith* that he exercised
12 reasonable diligence in the period heading into the putative August 4, 2008, expiration
13 date and thereafter through the remainder of the 337-day period prior to statutory tolling
14 otherwise becoming again available. There is no currently viable caselaw, with the 2014
15 *Gibbs* decision now abrogated, that in effect would give Valerio a "free pass" as to
16 diligence not only up to the August 4, 2008, putative expiration of the federal limitation
17 period but also for nearly ten months thereafter. Under the prior established law now
18 reaffirmed by *Smith*, Valerio must show reasonable diligence for all periods during which
19 statutory tolling is not available. There is no open question in that regard.

20 Valerio currently presents no factual basis for a claim of reasonable diligence
21 following the conclusion of the *Lozada* proceedings on June 17, 2008. If the Court rules
22 on the legal issues raised in the current briefing adversely to Valerio as it has in this order,
23 his counsel then seeks an opportunity to develop those facts. Valerio posits that the Court
24 – after yet further piecemeal briefing – then will be able to decide if an evidentiary hearing
25 should be expanded to include the period after the *Lozada* proceedings.

26 The pertinent question at this point after *Smith*, however, is not whether an
27 evidentiary hearing should be expanded but rather is whether one should be held at all.
28 If Valerio is unable to present a potentially viable basis for a claim of reasonable diligence

1 as to all untolled time periods, including the approximately 11 months following the
2 conclusion of the *Lozada* proceedings, then there would be a substantial question as to
3 whether an evidentiary hearing should be held. A petitioner's failure to demonstrate
4 reasonable diligence for periods as short as five and seven months on the facts presented
5 led to the Supreme Court holding that the petitioner was not entitled to equitable tolling.
6 See *Pace v. DiGuglielmo*, 544 U.S. 408, 419 (2005).

7 The Court therefore will require Valerio, after a reasonable opportunity for internal
8 consultation, to file a motion for an evidentiary hearing supported by specific allegations
9 of fact and competent evidence presented with the motion.

10 Before discussing the requirements for the motion further, the Court notes the
11 following for context. The state and federal postconviction litigation of this case spans
12 eighteen years, including now nearly ten years in federal court. It further has been
13 approaching seven years since the Ninth Circuit remanded this case for further
14 consideration of limitation-period issues.

15 Typically, all potential issues relating to a time-bar defense in a habeas case can
16 be fully briefed with the necessary factual support in a single round of briefing. In this
17 case, the Court has directed and/or allowed the parties to subdivide the overall time-bar
18 issue in this case following the remand into multiple subsidiary issues, to brief those
19 issues serially in piecemeal fashion, to obtain a ruling from the Court on a subsidiary issue
20 or issues, and then continue yet further piecemeal briefing on yet additional subsidiary
21 issues.

22 That ends here. If subsidiary issues remain to be resolved, the parties must argue
23 in the alternative, with full legal argument and factual support for their position on any
24 such alternatives. If a party with the burden of proof on an issue fails to provide legal
25 argument and factual support on the issue, then that party will lose on that issue. There
26 will be no more "kicking the can down the road" for a further opportunity for factual
27 development, for more briefing and/or to a later proceeding. Requests for such deferral
28 embedded in a brief will be disregarded, and the Court will proceed to a decision.

1 Accordingly, Valerio's motion for an evidentiary hearing must, *inter alia*: (a) set
 2 forth specific allegations of actual historical fact supported by competent evidence on all
 3 material factual issues; and (b) thereby establish a potentially viable basis for equitable
 4 tolling in all respects, including demonstrating reasonable diligence during the 337-day
 5 period, both before and after the putative expiration of the federal limitation period on
 6 August 4, 2008. If Valerio fails to present sufficient facts to sustain a viable claim of
 7 equitable tolling taking into account all untolled time periods, the most probable outcome
 8 will be that no evidentiary hearing will be held and the petition instead will be dismissed
 9 as time-barred.¹² The only opportunity that Valerio will be given to tender competent
 10 evidence tending to establish a potentially viable factual basis for reasonable diligence
 11 for all relevant periods, including the 337-day time period, is with the motion for an
 12 evidentiary hearing. If Valerio does not present specific allegations of actual historical
 13 fact supported by competent evidence with the motion, the petition likely will be dismissed
 14 as untimely. If Valerio only defers to a possible evidentiary hearing "to develop" specific
 15 facts while presenting only vague and conclusory allegations with the motion, there likely
 16 will no evidentiary hearing and the case will be dismissed. In short, the time to come
 17 forward with supporting specific actual historical fact and evidence is *with the motion*, not
 18 at some later point or proceeding down the line.

19 The Court notes that the circumstances relevant to equitable tolling vis-à-vis the
 20 337-day period, and particularly reasonable diligence, typically should concern
 21 circumstances that are known to Valerio himself. A reasonable opportunity for internal
 22 consultation should be all that is necessary prior to the filing of a motion for an evidentiary
 23 hearing. While the Court does not wholly foreclose the possibility of discovery on a
 24

25 ¹² The Ninth Circuit remanded "for an evidentiary hearing or for other further factual development
 26 as may be necessary to determine whether Valerio has exercised diligence." An evidentiary hearing
 27 therefore is not inexorably required if other factual development provides an adequate basis for a decision.
 28 The Court of Appeals further directed that "[i]f the court concludes that Valerio diligently pursued his rights
 then it should consider whether Valerio has otherwise demonstrated that he is entitled to equitable tolling
 of the one-year limitations period." (ECF No. 24, at 3.) If Valerio does not present a potentially viable basis
 for a claim of reasonable diligence as to all time periods and in particular during the 337-day period, then
 he will not be entitled to equitable tolling.

1 showing of good cause via a separate motion, again, the facts relied upon to establish
 2 reasonable diligence typically should be matters within Valerio's own knowledge. The hill
 3 facing any motion for discovery therefore will be steep.

4 The hill also will be steep vis-à-vis any request for extension. The Court will allow
 5 a ninety-day period for Valerio's counsel to conduct internal investigation and file a
 6 supported motion for an evidentiary hearing. That is enough time to fully investigate and
 7 file pleadings on the merits in many habeas cases. That should be sufficient on the time-
 8 bar issues, now at – the end – of nearly seven years of post-remand briefing. The Court
 9 understands that COVID-19 protocols (as to all involved) may preclude in-person legal
 10 visitation with Valerio indefinitely. However, the Court will not delay a final resolution of
 11 the time-bar issues in this case until that situation changes. The Court herein directs
 12 respondents to facilitate Valerio being able to confer confidentially and seasonably on
 13 these issues with counsel and/or her assistants at the very least by telephone in a manner
 14 that remains substantially consistent with NDOC's COVID-19 protocols. The parties
 15 further shall note the additional provisions regarding extension requests in the disposition
 16 paragraphs in this order.¹³

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19 ¹³ Finally, the Court notes that Valerio asserts that statutory tolling from the timely May 21, 2009,
 20 state petition would run through only the September 29, 2010, order of affirmance in that proceeding. (See
 21 ECF No. 91, at 3 n.3; at 4, line 16; and at 7, line 16.) It is the Court's understanding, however, that any
 22 such statutory tolling would run instead through the October 27, 2010, issuance of the remittitur. See, e.g.,
Orpiada v. McDaniel, 750 F.3d 1086, 1088 n.1 (9th Cir. 2014); *Jefferson v. Budge*, 419 F.3d 1013, 1015 n.2
 23 (9th Cir. 2005); see also *Lawrence v. Florida*, 549 U.S. 327, 331 & 332 (2007) (the parties agreed that
 24 statutory tolling continued through the state supreme court's November 18, 2002, issuance of the mandate,
 25 as opposed to its October 17, 2002, per curiam decision affirming the denial of postconviction relief); *Branch*
Banking & Trust Co. v. Gerrard, 134 Nev. 871, 874, 432 P.3d 736, 739 (2018) (an appeal concludes upon
 26 issuance of the remittitur); *Weddell v. Stewart*, 127 Nev. 645, 647, 649 & 652-53, 261 P.3d 1080, 1082,
 27 1083 & 1085 (2011) (contrasting a related appeal in the litigation that still was pending because the remittitur
 28 had not yet issued with an appeal that was not pending because the remittitur instead had issued). While
 Valerio cites a prior order by this Court for the September 29, 2010, end date, the Court did not constrain
 statutory tolling by that date in the cited order. The later October 27, 2010, date falls after both the
 constructive and actual filing dates of the federal petition. While the alacrity with which Valerio proceeded
 after September 29, 2010, is laudable, Valerio needs to show reasonable diligence, *inter alia*, more
 principally instead between June 17, 2008, and May 21, 2009, and especially before the putative expiration
 date of the federal limitation period on August 4, 2008. Showing only belated alacrity after an *arguendo*
 prior prolonged period without the exercise of reasonable diligence would not suffice, particularly a prior
 period spanning the putative expiration date of the federal limitation period.

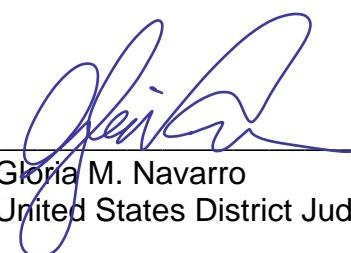
1 IT THEREFORE IS ORDERED that Valerio shall have ninety (90) days from entry
2 of this order within which to file a motion for an evidentiary hearing on the time-bar issues
3 that (a) is fully briefed on all legal issues that remain for decision, as to all relevant periods,
4 and (b) further is fully supported on all factual points potentially material to those issues
5 by specific allegations of actual historical fact and corresponding competent evidence
6 presented with the motion. The briefing cycle on the motion will be as per the local rules.

7 IT FURTHER IS ORDERED that respondents on reasonable request shall facilitate
8 to the extent practicable Mr. Valerio being able to confer confidentially and seasonably
9 with counsel and/or her assistants at the very least by telephone in a manner that remains
10 substantially consistent with the state corrections department's COVID-19 protocols.

11 IT FURTHER IS ORDERED that any requests for extension of time with respect
12 to any deadline associated with this order are strongly discouraged. Any such requests
13 for extension of time based upon scheduling conflicts with matters in this or any other
14 court, including the Ninth Circuit, must show that (a) the other matter was filed prior to the
15 original October 15, 2010, actual filing date of this matter; and (b) if the scheduling conflict
16 is with a matter in any other court, including the Ninth Circuit, counsel has specifically
17 timely copied the other court with this order and that court has both acted upon and denied
18 a timely request for an extension of time in that court that was sought in full or in part
19 based upon the time demands placed upon counsel by this order. A copy of the extension
20 denial order(s) in the other court(s) must be attached with the motion for an extension of
21 time. The Court intends to bring this matter to a just and appropriate conclusion as
22 expeditiously as possible, subject only to a contrary order by the Ninth Circuit effectively
23 prioritizing a matter in that court ahead of this matter.

24 DATED THIS 5th day of August, 2020

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Gloria M. Navarro
United States District Judge